No. 8408

United States
Circuit Court of Appeals

For the Ninth Circuit

C. E. HULL, Receiver of The Nogales National Bank of Nogales, Arizona, a national banking association,

Appellant,

vs.

SANTA CRUZ COUNTY, a body politic and corporate,

Appellee.

Brief for Appellant

Upon Appeal From the District Court of the United States for the District of Arizona

STEPHEN D. MONAHAN,
Nogales, Arizona,
Attorney for Appellant.

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BASIS OF JURISDICTION

The United States District Court has jurisdiction in this matter by virtue of the provision of the Judicial Code, Title 28, Section 41, Subsection 16, which is as follows—Subsection 16. Suits against National Banking Associations commenced by direction of the United States or by direction of any officer thereof, against any National Banking Association, and cases for winding up the affairs of any such bank.

The United States District Court has jurisdiction in this matter by virtue of the provision of the Judicial Code Title 28, Section 41, Subsection 1, which is as follows: The District Court shall have original jurisdiction as follows: First on all suits of a civil nature at common law or in equity brought by the United States or by any officer thereof authorized by law to sue . . . or where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the Constitution or laws of the United States. . . . The answer and counterclaim or cross-complaint of the defendant at page 17 of the transcript of record, paragraph 5, contains a formal allegation that the amount in controversy is in excess of $3,000.00; that the action is one brought by direction of the Comptroller of the United States Currency; and that the action involved the construction of a United States statute.

> "Formal allegation that the amount in controversy is in excess of $3,000.00 is sufficient to give Federal District Court jurisdiction."
>
> KNOS, Inc. v. Associated Press, 57 S. Ct. 197.

The complaint of Santa Cruz County, pages 1 to 7, inclusive, transcript of record, sets forth an action against a National Banking Association and an action for winding up the affairs of a national bank. The answer and counterclaim or cross-complaint of the defendant at page 17, paragraph 5, of the transcript of record contains a formal allegation that the answer was filed by direction of the Honorable Comptroller of the

United States Currency; that the action is one for winding up the affairs of a national banking association. Title 28, Judicial Code, Section 41, Subsection 16, provides that District Courts shall have original jurisdiction of all cases commenced by the United States or by direction of any officer thereof, against any National Banking Association, and cases for winding up the affairs of any such bank.

> "National Bank Receiver is an officer of the United States."
>
> Steele v. Randall, 19 F. (2d) 42;
>
> United States v. Wetzel, 246 U. S. 510, 62 L. Ed. 872.

This complaint having been filed in the Superior Court was susceptible of removal to the United States District Court by virtue of the fact that it is an action arising under the laws of the United States and is an action in which the District Courts of the United States have original jurisdiction. The provision for removal appears in Title 28 of the Judicial Code, Section 71, which provides that any suit of civil nature in law or in equity arising under the constitution or laws of the United States, or any other suit of a civil nature in law or in equity of which the District Courts of the United States are given jurisdiction, in any state court may be removed into the District Court of the United States for the proper district.

The jurisdiction of the United States Circuit Court of Appeals is based on provisions of Title 28, Judicial

Code and Judiciary, Section 225, which is as follows: (Review of final decisions)—The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions— . . . Third . . . in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $1,000.00. The amount prayed for in the complaint, page 1 of transcript of record at page 7, is $11,153.15 and the decree of the District Court, page 61 of the transcript of record, at page 65, gives judgment to the plaintiff for the sum of $5,968.25. The sum set forth in the answer and counterclaim or cross-complaint, page 15, of the transcript of record, at page 17, paragraph 5, is set forth as exceeding the sum of $3,000.00.

STATEMENT OF CASE

This is an appeal from a judgment and decree entered in the United States District Court for the District of Arizona at Tucson, Arizona, establishing a pledge lien of the plaintiff, Santa Cruz County, on securities owned by The Nogales National Bank and directing foreclosure of the lien and sale of such securities.

On December 31, 1935, the plaintiff and appellee Santa Cruz County, filed its complaint seeking to establish and foreclose a lien upon Twenty-one (21) City of Nogales Waterworks bonds of the par value of Twenty-one Thousand (($21,000.00) Dollars, Nine (9) City of

Nogales Sewage bonds of the par value of Nine Thousand ($9,000.00) Dollars, and Five (5) Salt River Valley Water Users Association bonds of the par value of Five Thousand ($5,000.00) Dollars.

The complaint was filed in the Superior Court of Santa Cruz County and on January 24th, 1936, defendant secured an order for removal to the United States District Court, for the District of Arizona, at Tucson, Arizona.

The complaint alleged the existence of the plaintiff as a body politic and corporate within the State of Arizona, the organization and existence of the defendant, the Nogales National Bank as a national banking association in the City of Nogales, County of Santa Cruz and State of Arizona, the closing of its doors on December 1st, 1931, declaration of insolvency by the Comptroller of the United States Currency on December 16, 1931, and appointment of a receiver. It alleged further the appointment of the defendant W. J. Donald as receiver on February 1, 1932, and his possession, as such receiver, of the assets of the bank at time of filing complaint. The complaint further alleged the designation of The Nogales National Bank by county authorities as a depository of county funds; the deposit of Fifty Thousand ($50,000.00) Dollars of county funds; the delivery on June 28, 1928, by The Nogales National Bank to the National City Bank of New York, Twenty-one City of Nogales Waterworks bonds of the par value of One Thousand ($1,000.00) Dollars

each, Nine City of Nogales Sewage bonds of the par value of One Thousand ($1,000.00) Dollars each, the delivery on April 10, 1931, of Five Salt River Valley Water Users Association bonds of the par value of One Thousand ($1,000.00) Dollars each; that all of said bonds were pledged as security for payment of public monies. The complaint further alleged on February 26, 1932, demand by the County Treasurer on the receiver for payment of money on deposit, with interest; that at the time of filing of the complaint Thirty-eight Thousand Eight Hundred Forty-six and 85/100 ($38,846.85) Dollars, together with interest to June 15, 1935, had been paid, and that Eleven Thousand One Hundred Fifty-three and 15/100 ($11,153.15) Dollars, with interest from June 15, 1935, at the rate of six (6%) per cent was due and unpaid; that the bonds so described were then in the possession of the County Treasurer.

W. J. Donald, as receiver, defendant filed his answer and counterclaim admitting and alleging that on January 3, 1925, Anna B. Ackley, as County Treasurer, deposited Thirty Thousand Seven Hundred Two and 7/100 ($30,702.07) Dollars of county money in The Nogales National Bank and subsequently other deposits until on or about May 7, 1928, there was so on deposit the sum of Fifty Thousand ($50,000.00) Dollars; that the account was transferred by her to her successor in office, A. Dumbauld on January 2, 1929; that since January 2, 1933, the bank's books have car-

ried the account in the name of Anna B. Ackley, the former treasurer and successor to A. Dumbauld, and that since June 1, 1928, no deposits of money or credits of any kind have been made in the account.

Defendant further alleged the delivery to the National City Bank of Fifteen (15) Pima County School bonds of the par value of Fifteen Thousand ($15,000.00) Dollars, and Five (5) Salt River Valley Water Users Association bonds of the par value of Five Thousand ($5,000.00) Dollars, on March 14, 1928, receiving in return an escrow receipt which implied an interest of the plaintiff in the bonds but set forth no terms nor conditions of a pledge as alleged in the complaint. That thereafter on June 28, 1928, The Nogales National Bank delivered to the National City Bank of New York Twenty-one (21) City of Nogales Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars, and Nine (9) City of Nogales Sewage bonds of the par value of Nine Thousand ($9,000.00) Dollars, receiving therefore an escrow receipt identical with the one above described; that subsequently during February, 1931, the then County Treasurer surrrendered the said Five (5) Salt River Valley Water bonds to the bank.

The defendant further alleged his demand, as receiver, on the County Treasurer, Anna B. Ackley, on January 21, 1936, for the return of the Twenty-one (21) Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars, Nine (9) Sewage bonds

of the par value of Nine Thousand ($9,000.00) Dollars, and Fifteen (15) Pima County School bonds of the par value of Fifteen Thousand ($15,000.00) Dollars, and alleged that their delivery to the New York City Bank in pledge or otherwise was illegal and *ultra vires*.

Defendant sought also to have Anna B. Ackley and A. Dumbauld made additional parties defendant and on order of the court were brought in. The relief sought by defendant was delivery of the bonds demanded on January 16, 1936, namely: Twenty-one Thousand ($21,000.00) Dollars in Nogales Waterworks and Improvement bonds, Nine Thousand ($9,000.00) Dollars in Nogales Sewage bonds, and Fifteen Thousand ($15,000.00) Dollars in Pima County School District Bonds, and in each case the interest collected subsequent to closing of bank, and proceeds thereof, if sold, together with an accounting. Defendant made no claim to Seven Thousand ($7,000.00) Dollars worth of Salt River Valley bonds pledged on April 10, 1931.

The case was tried before the court without a jury on an agreed statement of facts. The decision of the court upheld the validity of the purported pledge and decreed foreclosure and sale of the bonds under execution to satisfy a judgment for Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars, but denied plaintiff interest from the date of the receivership. Exception was entered on behalf of the defendant C. E. Hull, as receiver, who had been substituted for the previous defendant W. J. Donald.

In the court below, the plaintiff based its case on the proposition that the passage of the Amendment of June 25, 1930, validated the attempted pledge of securities as to deposits made prior to the passage of the act even though there had been no repledging of the securities sought to be recovered by defendant nor redepositing of funds after the passage of the act.

Defendant's position was that:

I.

Prior to the passage of the Amendment of the National Bank Act on June 25, 1930, national banks in Arizona were utterly without power to pledge their assets to secure deposits of funds of a state or political subdivision thereof, and any such attempted pledges were utterly illegal and void.

II.

That the passage of the Amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there was a repledging of the securities sought to be recovered or redepositing of the funds, neither of which occurred in the instant case.

III.

A contract beyond the power of a corporation to make cannot be made valid by confirmation, ratification or estoppel and the conduct of the bank and receiver in apparently acquiescing in an illegal pledge is of no effect whatsoever.

IV.

To hold that the passage of the Amendment validated an illegal and *ultra vires* pledge as to deposits made prior to June 25, 1930, is to give the Amendment a retroactive operation.

V.

No law should be given a retroactive or retrospective operation unless such intention of the legislature is plainly expressed in the law.

VI.

A ratable distribution of this bank's assets should be had but would be impossible were these illegal pledges upheld.

VII.

No interest can be paid on deposits from and after date of receivership.

VIII.

The receiver may recover securities unlawfully pledged without making restitution to pledgee.

IX.

The receiver, appellant, is entitled to recover twenty-one (21) Nogales Waterworks bonds of the par value of Twenty-one Thousand ($21,000.00) Dollars together

with interest collected on same from date of closing of the bank; also

Nine (9) Nogales Sewage Disposal Bonds of the par value of Nine Thousand ($9,000.00) Dollars together with interest collected on same from date of closing of the bank; also

The sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, being the sum realized by plaintiff on the sale of Fifteen (15) Pima County School bonds, together with interest collected on same since the closing of the bank, all of which bonds constituted the body of the illegal pledges.

SPECIFICATION OF ERROR RELIED UPON

The assignments of error are set forth in the record on pages 81 to 85, inclusive, and more particularly as follows:

No. I	page 81 of Record
No. II	page 81 of Record
No. III	page 82 of Record
No. IV	page 83 of Record
No. V	page 83 of Record
No. VI	page 83 of Record
No. VII	page 84 of Record
No. VIII	page 84 of Record

All are relied upon but assignments I, III, VI, VII, and VIII are of such a nature that the same argument applies to each, and accordingly, they will be argued as a whole.

The propositions involved in these assignments of error may properly be specified and set forth as follows:

I.

Prior to the passage of the Amendment of the National Bank Act on June 25, 1930 (Brief, p. 16), national banks in Arizona were utterly without power to pledge their assets to secure deposits of funds of a state or political subdivision thereof, and any such attempted pledges were utterly illegal and void.

II.

The passage of the Amendment did not validate pledges as to deposits made prior to June 25, 1930, unless there was a repledging of the securities or redepositing of the funds, neither of which occurred in the instant case.

III.

To hold that the passage of the Amendment validated an illegal and *ultra vires* pledge as to deposits made prior to June 25, 1930, is to give the Amendment a retroactive operation.

IV.

No law should be given a retroactive or retrospective operation unless such intention of the legislature is plainly expressed in the law.

V.

A contract beyond the power of a corporation to make cannot be made valid by confirmation, ratification or estoppel and the conduct of the bank and receiver in apparently acquiescing in an illegal pledge is of no effect whatsoever.

VI.

The receiver may recover securities unlawfully pledged without making restitution to pledgee.

VII.

Assets of National Bank paid out or disposed of under misapprehension of law may be recovered.

VIII.

Apparent recognition of illegal pledge by receiver not binding on creditors of bank.

IX.

A ratable distribution of this bank's assets should be had but would be impossible were these illegal pledges upheld.

BRIEF AND ARGUMENT

Error

1. The judgment of the court below is contrary to law.

2. The court below erred in finding that the plaintiff, Santa Cruz County, is the owner and holder of a pledge lien upon the following described bonds, the property of the receiver of said The Nogales National Bank, to-wit:

> Twenty-one (21) City of Nogales Waterworks Improvement bonds issued by the City of Nogales, a municipal corporation in the State of Arizona, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twenty-three (23) to forty-three (43), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each;
>
> ALSO, nine (9) City of Nogales Sewage Disposal bonds issued by said City of Nogales, said bonds being of the denomination of One Thousand ($1,000.00) Dollars each, numbered serially from twelve (12) to twenty (20), both inclusive, dated December 1, 1927, bearing interest at the rate of four and one-half (4½%) per cent per annum, payable on June 1 and December 1 of each year; together with the consecutively numbered coupons for the payment of the interest upon said bonds and being attached to said bonds, in the sum of Twenty-two and 50/100 ($22.50) Dollars each.

3. The court below erred in ordering, adjudging and decreeing that the amount of Five Thousand Nine

Hundred Sixty-eight and 25/100 ($5,968.25) Dollars (or any other amount) is secured by a pledge lien upon all of said bonds and coupons, and said lien is hereby foreclosed; that a special execution shall issue as provided by law and the rules of this court, directing the marshal to sell said bonds and coupons, or so much thereof as may be necessary to satisfy said sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars with costs, and accruing costs as under execution, and that proceeds of sale thereof be applied on said amount so due plaintiff, with costs and accruing costs.

4. The court below erred in not finding that fifteen (15) certain bonds of the County of Pima School District No. 1, school building bonds bearing five (5%) per cent interest due March 1, 1939, with coupons attached, numbers 17 to 31 inclusive, of the par value of One Thousand ($1,000.00) Dollars each or the proceeds thereof, the sum of Fourteen Thousand Two Hundred Fifty-seven and 16/100 ($14,257.16) Dollars, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds or the said proceeds thereof delivered to this defendant as receiver aforesaid.

5. The court below erred in not finding that the said twenty-one (21) City of Nogales Waterworks bonds together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, and the said

nine (9) City of Nogales Sewage bonds, together with coupons attached and interest on the said bonds heretofore collected by the plaintiff, Santa Cruz County, its officers and agents, are the property of the said The Nogales National Bank and in not ordering, adjudging and decreeing that such bonds, coupons, and interest so collected, be delivered to this defendant as receiver aforesaid.

Prior to the Passage of the Amendment to the National Bank Act on June 25, 1930, National Banks in Arizona Were Utterly Without Power to Pledge Their Assets to Secure Deposits of Funds of a State or Political Subdivision Thereof, and Any Such Attempted Pledges Were Utterly Illegal and Void. The Passage of the Amendment Did Not Validate Pledges as to Deposits Made Prior to June 25, 1930, Unless There Was a Repledging of the Securities or Redepositing of the Funds, Neither of Which Occurred in the Instant Case.

1. The Act of June 25, 1930, C604, 46 Stat. 809 (12 U. S. C. A. No. 90) amends Section 45 of the National Bank Act of 1864 by adding thereto, the following:

> 2. "Any association may, upon the deposit with it of public money of a state of any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the state in which such association is located

in the case of other banking institutions in the State."

3. In the instant case the deposit in escrow, presumably as an attempted pledge, of the Pima County School bonds, Nogales Waterworks bonds and Nogales Sewage bonds, was made during the months of March and June of 1928, over two years prior to the passage of the amendment and at a time when the bank had absolutely no right to make such a pledge.

4. The last deposit of county funds in the bank bringing the amount of the deposit up to $50,000.00, was made during the month of May, 1928, and no deposit of monies or credits of any kind or description was made subsequent to June 1, 1928, more than two years prior to the passage of the 1930 amendment.

5. It may be said without fear of a contradiction that prior to the passage of this amendment, on June 25, 1930, National Banks could not legally pledge assets to secure deposits of public funds of a state or a political subdivision thereof. The Supreme Court definitely settled and closed that question.

6. In the case of Marion v. Sneeden, 291 U. S. 262, 268, 78 L. Ed. 787, the court said:

> "A National Bank could not legally pledge assets to secure funds of a State or a political subdivision thereof prior to the 1930 Amendment, and since then it can do so legally only if it is located in a State in which State banks are so authorized. In some States National Banks had prior to the 1930 Amendment frequently pledged assets to se-

> cure public deposits of a State or of a political subdivision thereof. Comptrollers of the Currency knew that this was being done and they assumed that the Banks had the power so to do, but the assumption was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

From the foregoing statement and from the cases hereinafter quoted, it definitely appears that any pledge of assets by a national bank prior to June 25, 1930, to secure deposits of either public or private funds is, without reservation or exception, positively illegal and void.

Texas & Pac. Ry. v. Pottorf, 291 U. S. 245, 78 L. Ed. 777;

Lewis v. Fidelity & Deposit Co. of Maryland, 292 U. S. 559, 78 L. Ed. 1425;

O'Connor v. Rhodes, 79 F. (2d) 147, 152;

Baldwin, Rec. v. Chase Nat'l. Bank, Opinion filed August, 1936, Northern Dist. New York;

Mays v. Wilkinson, 12 Fed. Supp. 350;

Ross v. Lee, 15 F. Supp. 972;

Faircloth v. Atlantic, 16 F. Supp. 131.

The trial court in its memorandum decision quoted Capital Savings & Loan Association v. Olympia Nat'l. Bank, 80 Fed. (2) 561, as follows:

> "The plain purpose of the amendment was to remove any doubt of the *power* of National Banks to give security for public deposits, and in that

respect to enable them to invite public deposits on an equal footing with State Banks."

Yet this cannot be correct for the Supreme Court of the United States has said in Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 258:

> "This amendment indicates that Congress believes that the original act had not granted general power to pledge assets to secure deposits. The fact that the amendment was made to Section 45 indicates that the power to pledge was granted only as an incident of the public officers duty to demand a pledge. If, as is suggested, the 1930 Amendment was passed merely in order to settle doubts as to the power of a National Bank to pledge its assets to secure deposits, the amendment would have been made, not to Section 45 but to Section 8 which contains the grant of incidental powers."

Senator Thomas, in introducing the bill, stated in the Senate:

> "It is a bill simply to confer on a National Bank the same opportunity for the giving of security for the safe keeping and prompt payment of State and County moneys, as is authorized with reference to State banking institutions." 72 Cong. Record 6243. It was an entirely new grant of power.

The Passage of the Amendment Did Not Validate Pledges as to Deposits Made Prior to June 25, 1930, Unless There Was a Repledging of Securities Sought to be Recovered or Redepositing of the Funds.

The trial court continuing said, "Upon the passage of the amendment The Nogales Natl. Bank was empowered to pledge its security and to ratify an executory or continuing pledge, previously beyond its power. It was not necessary to go through the formality of executing a new pledge." (Quoting Lewis v. Fidelity & D. Co., 292 U. S. 559.) But the circumstances are decidedly different.

In the Lewis case there was a bond to secure deposits, a four year bond commencing in 1928. This was a definite agreement to run four years. In the case at bar the attempted pledge was made in March and June of 1928 for no definite term. It could have been terminated in a day or week.

In the Lewis case all of the funds were withdrawn from the bank after the passage of the amendment and subsequently redeposited. They were thereafter added to and checked upon. The withdrawal and redepositing, after the passage of the amendment, of the entire deposit was obviously a new agreement. In the case at bar not one cent was withdrawn nor one added to the deposit subsequent to June 1, 1928. In the Lewis case the Supreme Court refused to pass on the question of deposits made prior to the passage of the amendment.

In the Lewis case there was a general lien to enforce the bond. The lien was created by law as an incident of the bond, and is vastly different from a lien sought to be established as a result of an illegal and *ultra vires* pledge of specific securities to secure a deposit of moneys made wholly before the passage of the amendment. The trial court quoted Ross v. Knott, 13 Fed. Supp. 963, a district court case from the Northern District of Florida. In this case the Florida judge stated that this particular case presented a question quite similar to that in the Lewis v. Fidelity (supra). Yet such obviously was not the case. The Supreme Court of the United States refused to pass on the question so quickly decided by the Florida district judge.

The court below cited the Lewis case as authority for the statement:

> "The appointment of the depository was within the power of the State to confer and the bank to accept, but by reason of the paramount Federal Law the pledge could not arise. When that obstacle was removed by the amendment the original agreement could as to the future have full effect."

This was a condensation of the paragraph that in my opinion overlooked the all important qualification included in that paragraph. For the Supreme Court said:

> "When that obstacle was removed by the Act of June 25, 1930, the original agreement could *as*

> *to the future* be given the effect intended by the parties; and *the lien became operative as to deposits thereafter made* and is entitled to priority from the date of the Act." (Italics mine.)

The distinction is significant. And a few lines thereafter the Supreme Court expressly disclaimed any opinion as to deposits made before the enabling act when it said:

> "We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date."

To Hold That the Passage of the Amendment Validated an Illegal and Ultra Vires Pledge as to Deposits Made Prior to June 25, 1930, Is to Give the Amendment a Retroactive Operation.

No Law Should be Given a Retroactive or Retrospective Operation Unless Such Intention of the Legislature Is Plainly Expressed in the Law.

In the case now under consideration the decision appealed from was based squarely upon the proposition that the amendment validated a pledge made prior to June 25, 1930, as to deposits made prior to June 25, 1930.

The securities sought to be recovered were put up in escrow two years before the passage of the amendment and the funds intended to be secured thereby also were deposited years before the passage of the

amendment. Any construction of the amendment which relates back and gives to these transactions some different legal effect from what they had under the law when these transactions occurred render the statute retrospective in its operation. The construction applied by the court below would create a cause of action where none existed before. "A retrospective statute is regarded with disfavor." "A statute will not be given a retroactive construction unless it is distinctly expressed or clearly and reasonably implied that the statute is to have such retroactive effect." There is nothing on the face of the statute from which it can be inferred that this statute should be construed retroactively.

Ross v. Lee, 15 Fed. Supp. 972.

The general rule as to prospective and retrospective operation of statutes is set forth in 25 R. C. L. 785, as follows:

> "A retrospective law, in the legal sense, is one which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under

the law when it occurred. A retrospective law may be further defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inhereint in their nature, in view of the law in force at the time of their occurrence."

In 25 R. C. L., page 786, it is said:

"Purely retrospective laws involve the exercise of judicial rather than strictly legislative power. Operating not only on future rights and liabilities but also on matters that occurred, or rights and liabilities that existed, before the time of enactment, they pronounce judgment on what was done before their enactment. Every law that takes away or impairs rights that have vested under existing laws is generally unjust and may be oppressive. Hence, such laws have always been looked on with disfavor. It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation (*nova constitutio futuris formam imponere debet non praeteritis*). The objection to retroactive legislation has also been expressed in the maxim, *Leges quae retrospiciunt raro, et magna cum cautione sunt adhibendae neque enim Janus locatur in legibus,* 'laws which are retrospective are rarely and cautiously received, for Janus has really no place in the laws.' The American constitutions of many of the states contain no provisions directly forbidding retrospective laws, such laws are void if they impair the obligation of contracts or vested rights. Even

though the legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute. If all of the language of a statute can be satisfied by giving it prospective action only that construction will be given it. Especially will a statute be regarded as operating prospectively when it is in derogation of a common-law right, or the effect of giving it retroactive operation will be to destroy a vested right, or to render the statute unconstitutional. The postponement of the time when a statute shall become effective evidences an intent to make it of retrospective operation. It has been declared that, in the absence of express words to that effect, a law can operate only upon future, and not upon past transactions. But this is too broad a statement of the rule. The intention of the legislature controls, and if it is unmistakable that an act was intended to operate retrospectively that intention must be given effect, even though it is not disclosed by express words, and even though the law, thus construed, must be declared to be invalid."

In the case of Harvey v. Tyler, 2 Wallace 328, 1 L. Ed. 871, the court holds:

> "All statutes are to be considered prospective unless their language is expressed to the contrary or there is a necessary implication to that effect."

In the case of United States v. Union Pac. Ry., 98 U. S. 569, 25 L. Ed. 143, it is held:

> "It will not be presumed unless the language of the statute imperatively requires it that Congress intended by a retrospective law to create new rights in one party at the expense of the rights of other parties, or that where no right of action existed Congress intended to create a right of action founded on past transaction."

In U. S. Fidelity & Guaranty Co. v. United States, 209 U. S. 306, 52 L. Ed. 804, it is held:

> "A statute will be presumed not to have meant to act retroactively and should never receive such construction if it is susceptible of any other or unless the words used are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied."

In the case of City Railroad v. Citizens Street Railway Co., 166 U. S. 557, 41 L. Ed. 1114, it is held:

> "A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage unless its language be so clear as to admit of no other construction."

In Schwab v. Doyle, 66 L. Ed. 747, 258 U. S. 528, it is held:

> "Laws are not to be considered as applying to cases which arose before their enaction unless that intent be clearly declared."

The court below regarding this as a case similar to that of Ross v. Knott (supra) from the northern district of Florida seemingly has relied on the reasoning put forth in that opinion. The Florida judge quoted with approval the language in the case of Lewis, Receiver v. Fidelity & Deposit Company of Maryland (supra):

> "A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The lower court evidently construed this language to mean that it would not render the Amendment retroactive to apply it to deposits under a pledge agreement when both the pledge and the deposits thereunder were made prior to the operative date of the Amendment. It would seem that what the Supreme Court meant is, that it would not render the Amendment retroactive to apply it to *deposits that were made after the operative date of the Amendment for the unexpired period of a continuing pledge agreement executed prior to the operative date of the Amendment.* (Italics mine.)

The antecedent facts to which reference was made by the Supreme Court were the fact of the existence of an unexpired continuing pledge made before the operative date of the Amendment that extended for a period beyond the operative date of the Amendment

and the fact of the delivery of a bond prior to the operative date of the Amendment in pursuance of the pledge, as distinguished from the fact that the deposits were made prior to the operative date of the pledge. The court held in effect that as the pledge agreement had not by its terms expired when the Amendment that authorized the same became operative and as a bond had been delivered pursuant to the pledge prior to the operative date of the Amendment, that the application of the Amendment to deposits in pursuance of the pledge made after the operative date of the Amendment did not render the application of the Amendment retroactive as to deposits made during the unexpired period of the pledge. In other words, the application of the statute to deposits that were made prior to June 25, 1930, under a continuing pledge agreement and bond that were likewise made prior to June 25, 1930, would give the statute a retroactive operation; whereas, the application of the statute to deposits that were made subsequent to June 25, 1930, under the unexpired period of a continuing pledge agreement which was made prior to June 25, 1930, the collateral in pursuance of the pledge having been delivered prior to the operative date of the Amendment, would not give the statute a retroactive application because the statute would draw upon the hereinbefore enumerated antecedent facts for its operation. All of the deposits in the case now before the court, however, were made prior to June 25, 1930, and the col-

lateral sought to be recovered also having been pledged prior to June 25, 1930; to apply the statute to deposits made prior to the operative date of the Amendment under a pledge agreement which was made prior to the operative date of the Amendment, the pledged collateral having also been delivered prior to the operative date of the Amendment, would render the statute retroactive in its application.

In the case of Columbus Spar v. Starr, 214 N. Y. Supp. 652, the Supreme Court of New York quotes with approval the rules of statutory construction as to a retroactive effect as such rule is set forth in Johnson v. United States, 17 Court of Claims, page 171, as follows:

> "A statute does not operate retrospectively when it is made to apply to *future transactions,* merely because those transactions have relation to and are founded upon antecedent events."

As to the Amendment of June 25, 1930, any other construction than the one for which appellant contends would have the effect of bringing into existence a new obligation thereby impairing vested rights.

Retroactive legislation is not favored. A statute will be given retroactive effect only when Congressional intent to that end clearly appears and the language used imperatively requires it.

Cameron v. U. S., 231 U. S. 710;
U. S. v. Union Pac. Ry. (supra);
White v. U. S., 191 U. S. 545;
U. S. F. & G. Co. v. U. S. (supra).

The court below took the position that:

> "The retention of the deposit by the Bank and the holding of the security intended to secure the former, for seventeen months after the Bank was authorized to enter into just such a transaction as this, constituted a ratification of the delivery of the securities for the purposes intended by the parties of securing the deposits left by the County on the Nogales Bank."

A Contract Beyond the Power of a Corporation to Make Cannot be Made Valid by Confirmation, Ratification or Estoppel.

There Could be no Ratification of a Pledge Made With Respect to Money Deposited in the Bank Prior to the Date of the Enabling Act Under a Pledge Agreement Which the Bank Was Without Power to Execute, Made Prior to the Date of the Enabling Act, Either by the Act of the Bank or by Change of the Law in Force When the Transactions Were Consummated.

Prior to the enabling Act of June 25, 1930, the Bank was without power to pledge assets; the pledge of assets was beyond the powers conferred by Congress. A contract not within the scope of the powers conferred on the corporation cannot be made valid by subsequent ratification or part performance and a transaction originally unlawful cannot be made any better by ratification since existing statutes enter into the terms of a contract by implication.

The law in force at the time a transaction is consummated determines its validity.

In Memphis Railroad v. Commissioners, 112 U. S. 623, 28 L. Ed. 842, the Supreme Court holds:

> "It is, of course, the law in force at the time the transaction is consummated and made effectual that must be looked to as determining its validity and effect."

In the case of Schaun v. Brandt, 116 Md. 560, 82 Atl. 554, it is held:

> "If the law in force in 1908 did not give the company the power to purchase its stock, and the contract was, therefore, illegal the Act of 1909 did not change the character of that contract. The validity of an agreement depends upon the law existing at the time that it is made. In the case of Stewart v. Thayer, 47 N. E. 420, where the contract was entered into in 1893 and was held to be contrary to the existing law of Massachusetts which was changed by the Statute of 1894, the court held that 'the validity of the contract must be determined by the law as it existed in 1893'."

In the case of Chas. H. Steefey v. Bridges, 117 Atl. 887 (Md.), it is held:

> "Where a property owner contracted to pay a real estate agent a commission for securing a tenant for certain property, and a lease was made to the United States Post Office Department during the time when under postal laws and regulations No. 56½ a contract entered into by the Post Office Department must contain a covenant that the con-

tractor had not employed a third person to solicit or obtain the contract in his behalf, and all money payable to the contractor was free from obligation to pay any person for services rendered in the procurement thereof, a commission for securing a contract could not be collected regardless of the fact that amendments adopted subsequently to the contract would permit commissions to be paid to *bona fide* established real estate agents for securing such contracts."

In the case of International Products Company v. Vail's Estate, 123 Atl. 194 (Md.), it is held that:

"If agreement for payment of underwriting commissions in corporate stock was invalid when made, under Maryland laws, it cannot be validated by a law in force thereafter."

In People v. Nixon, 128 N. E. 245 (N. Y.), it is held:

"That the obligation of a contract is determined by the law in force when it is made, since existing statutes entered into the terms of a contract by implication."

In Anthony v. Household Sewing Machine Company, 5 L. R. A. 575 (R. I.), the holding of the court is condensed into the first and second headnotes as follows:

"1. Money loaned to a corporation to be repaid in preferred stock to be subsequently issued, may be recovered back where the corporation had at the time of the loan no power to issue such stock,

although the power to issue such stock has been granted to the corporation before the trial of the action."

"2. A contract by a corporation to repay a loan in preferred stock which it had no authority to issue is a nullity, and is not renewed by a subsequent Act authorizing it to issue a preferred stock, but which does not empower it to renew that contract."

"It would be a contradiction in terms to assert that there was a total want of power by an act to assume the liability and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

California Nat. Bank v. Kennedy, 167 U. S. 362, 271, 17 S. Ct. Rep. 831, 834.

Kavanaugh v. Fash, 74 F. (2) 435, referred to in the trial court's memorandum decision as relied upon by counsel for plaintiff and appellee, is far wide of the mark. It did pass on the question of deposits made after the passage of the amendment, but not before, and in that case there had been a repledging of the bonds, sought to be recovered, after the passage of the amendment. This case was disposed of on the pleadings when the answer revealed that fact.

Bearing in mind the facts that delivery of the securities sought to be recovered and the last of the deposits in the case at bar were made two years prior to the passage of the amendment and that the transac-

tion could have been terminated at any time within those two years, how can it be said that the passage of the amendment validated a pledge utterly beyond the power of the bank to make?

In the case of McDougald v. New York Life, 146 Fed. 678, the Circuit Court of Appeals of the Ninth Circuit quotes with approval the rule of interpretation of Amendments as set forth in Black on Interpretations, when the court said:

> "The Act of 1897 went into effect April 7, 1897, and the default in payment of premiums due occurred June 30, 1897. The general rule which we deem applicable to the present case is clearly stated in Black on Interpretation of Laws (Section 133, pp. 359, 360), as follows:
>
> " 'When an amendatory act provides that the original statute shall be amended "so as to read as follows," and thereupon, repeats some of the clauses or provisions of the amended statute and omits others, and at the same time introduces certain new clauses or sections, there are three points which must be chiefly noticed in regard to its operation and effect. In the first place, as to those portions of the original statute which the amendatory act simply retains, it is not generally to be construed as a new enactment. It does not repeal those provisions and then reenact them in the same terms, but they are to be considered as remaining in force from the time of the original enactment, and as being merely continued in operation by the amendatory statute. . . . In the second place, those provisions which are newly

> added by the amendatory statute are not to be considered as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act, and derive their whole efficacy and vitality from the amending law, and not from that amended. . . . In the third place, all those provisions of the original statute which are not repeated in the amending statute are abrogated or repealed thereby, and are, thereafter, of no force or effect whatever.'—Citing Ely v. Holton, 15 N. Y. 595, Moore v. Mausert, 49 N. Y. 332, and numerous other cases."

The Supreme Court has held repeatedly that a contract not within the scope of the powers conferred on the corporation cannot be made valid by a subsequent ratification nor part performance or that a transaction originally unlawful, cannot be made any better by ratification.

California Natl. Bank v. Kennedy (supra).

In this case was involved the question of the power of a National Bank to acquire the stock of a Savings Bank not taken as security or acquired in the course of the business of banking; the court in this last-cited case held:

> "The transfer of the stock in question to the bank being unauthorized by law, does the fact that under some circumstances the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

"Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of Thomas v. West Jersey R. Co., 101 U. S. 71; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290; Oregon R. & Nav. Co. v. Oregonian R. Co., 130 U. S. 371; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24; St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co., 145 U. S. 393; Union P. R. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564; and McCormick v. Market Nat. Bank, 165 U. S. 538—recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in Central Transp. Co. v. Pullman's Palace Car Co. (supra):

" 'A contract of a corporation, which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This language was also cited and expressly approved in Jacksonville, M. P. R. & Nav. Co. v. Hooper, 160 U. S. 514, 524, 530.

"As said in McCormick v. Market Nat. Bank, 165 U. S. 538, 550:

" 'The doctrine of *ultra vires,* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law.' "

Continuing, the court in this last-cited case holds:

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. National Bank v. Whitney, 103 U. S. 99; Union Nat. Bank v. Matthews, 98 U. S. 621. The difference between those cases and one like this was referred to in McCormick v. Market Nat. Bank (supra), and it is, therefore, unnecessary to particularly review them. The claim that the

bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void could not be confirmed or ratified. As was said by this court in Union P. Ry. Co. v. Chicago, R. I. & P. R. Co., 163 U. S. 564, speaking through Mr. Chief Justice Fuller (p. 581):

"'A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel.'"

In the case of Westerlund v. Black Bear Mining Co., 203 Fed. 612, it is held by the Circuit Court of Appeals of the Eighth Circuit:

"Another principle of law so firmly established as to be no longer debatable is that an act or contract of a corporation which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is neither wrong in itself nor against public

policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid until avoided, not void until validated, and it is subject to ratification and estoppel."

Obviously the attempted pledge was not within the corporate powers of the bank and as such is utterly void.

In the case of Texas Ry. v. Pottorf (supra) it is held:

"The Receiver is not estopped to deny the validity of the pledges. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed, and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. It is the duty of the Receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for distribution for the general creditors, even though the corporation itself was not in a position to do so."

The obligation of an *ultra vires* contract is void whether executed or executory.

Metropolitan Trust Co. v. McKinnon, 172 Fed. 846.

Restitution Is Not Necessary. The Receiver May Recover Securities Unlawfully Pledged Without Making Restitution to Pledgee.

"Since the Herrin Bank was without power to make the pledge of bonds herein in question, its Receiver is entitled to recover them unconditionally in order that they may be administered for the benefit of the general creditors of the bank."

Marion v. Sneeden, 291 U. S. 262, 54 S. Ct. 421, 423.

"The Receiver may assert the invalidity of the pledge *without making* restitution by paying the pledgee's claim in full. The railway's argument to the contrary is that when as a result of an *ultra vires* contract one of the parties is enriched at the expense of the other, the law creates an obligation to repay *ex aequo et bono* (in justice and fairness) to the extent of the enrichment. The argument, if applicable, would not help the railway. Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable res and a constructive trust based on special circumstances of misconduct, prefer a preference over the other creditors. The pledge here challenged having failed because illegal, the railway is entitled only to a dividend as a general creditor. Its right thereto is conceded."

Texas & Pacific Ry. v. Pottorf, 291 U. S. 245, 261, 262.

Obviously there is no identifiable res in the case of money deposited in a bank.

Blakely v. Brinson, 286 U. S. 254, 52 S. Ct. 516, 517.

In the case of People ex rel. Nelson v. Wiersema State Bank, 197 N. E. 537, 101 A. L. R. 514, wherein was involved the right of a receiver to recover assets which were illegally pledged, the court said:

> "One question remains to be considered. Appellant contends that even though this court should hold the contract and pledge to be *ultra vires* and void, it should not be required to surrender the assets except on condition that the receiver first pay to it the amount of its deposit at the time the bank ceased to do business. There is some authority in support of that proposition. State Bank of Commerce of Brockport v. Stone, supra, which is followed by an intermediate court in State v. Dean, 47 Ohio App. 558, 192 N. E. 278. But the weight of authority is against the contention. Divide County v. Baird, supra; City of Marion v. Sneeden, supra; Texas & Pac. R. R. Co. v. Pottorf, supra; Farmers' & Merchants' State Bank v. Consolidated School District, supra. There is a wide distinction between the effect of the exercise of a power not conferred upon a corporation and the abuse of a power granted or a failure to observe prescribed formalities or regulations. Durkee v. People, 155 Ill. 354, 40 N. E. 626, 46 Am. St. Rep. 340. In this state it is well settled that when a contract of a corporation is *ultra vires,* that is to say, outside the object of its creation as defined by the law of its organization and therefore beyond the powers conferred by the

> Legislature, it is not only voidable but wholly void, and of no legal effect. It cannot be ratified because it could not have been legally made. No performance by the parties can give it validity or become the foundation of any right of action upon it. Neither party is estopped by assenting to it or by acting upon it to show that it was prohibited. The power in controversy having been withheld, its exercise was thereby prohibited. The powers delegated by the state to corporations are matters of public law, of which no one can plead ignorance. Parties dealing with them are chargeable with notice of those powers and their limitations. A contract void because prohibited by law cannot in any manner be enforced. The law does not prohibit and also enforce a contract. Knass v. Madison and Kedzie State Bank, supra. Restitution would simply continue the wrong against innocent parties. Being bound to take notice of its illegality, appellant had no right to rely on a preference by the unlawful pledging of assets."

In the recent case of Baldwin, Receiver, v. Chase National Bank, decided by Judge Knox of the United States District Court of the Northern District of New York, not yet reported in the Federal Supplement, was involved the right of the Receiver of the Commercial National Bank to impress a trust upon the proceeds then on deposit in the Chase National Bank of the sale of bonds that had been pledged by the Commercial Bank with the War Department to secure

funds deposited in this bank by the Secretary of War, acting for the Government of the Philippine Islands. There was no statute of Congress authorizing the pledge. The court sustained the right of the Receiver to impress a trust in the funds derived from the sales of the illegally pledged securities with the trustee. The Bank in opposing the claim of the Receiver relied upon the rule of decision in the National Bank of Xenia v. Stewart, 107 U. S. 676; in holding the Xenia case inapplicable, Judge Knox points out the distinction between a voidable transaction that can be ratified and a void transaction which is immune from ratification in holding as follows:

> "In cases involving transactions with National Banks *ultra vires* the power of the bank, a distinction between the ability of the bank and the ability of the other party to the transaction to set up its *ultra vires* character has evolved. Compare Kerfoot v. Farmers & Merchants Bank, 218 U. S. 281, and National Bank of Xenia v. Stewart, supra, with California Bank v. Kennedy (supra), and McCormick v. Market Bank (supra).
>
> "That the original attempt to effectuate a pledge was *ultra vires* is now indisputably settled by Texas & Pacific Ry. v. Pottorf (supra), and City of Marion v. Sneeden (supra). In Texas & Pacific Ry. v. Pottorf, Mr. Justice Brandeis said:
>
> " 'National Banks lack power to pledge their assets to secure a private deposit. The measure of their powers is the statutory grant; and powers not conferred by Congress are denied.
>
> . . .

" '. . . The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Bank v. Kennedy, supra; McCormick v. Market Bank (supra); Central Transportation Co. v. Pullman Co. (supra). But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. . . .

" 'The Receiver may assert the invalidity of the pledge without making restitution by paying the pledgee's claim in full. The Railway's argument to the contrary is that when as a result of an *ultra vires* contract one of the parties is enriched at the expense of the other, the law creates an obligation to repay *ex aequo et bono* to the extent of the enrichment. The argument if applicable would not help the Railway. Such claim under the doctrine of unjust enrichment is assimilated to an obligation of contract; and does not, in the absence of an identifiable res and a constructive trust based on special circumstances of misconduct, confer a preference over other creditors. The pledge here challenged having failed because

illegal, the Railway is entitled only to a dividend as a general creditor. Its right thereto is conceded.' "

Federal Courts Hold That Assets of a National Bank That Have Been Illegally Paid Out or Disposed of Under a Misapprehension of Law May be Recovered.

That the receiver apparently acquiesced in the detention by the treasurer of Santa Cruz County of the bonds illegally pledged, interest collected from them, and the principal of bonds sold by the treasurer, under a misapprehension of law, will not prevent a recovery of the same.

In the case of O'Connor v. Rhodes, 79 F. (2d) 147, it appears that the plaintiff was creditor of the Commercial National Bank which was found to be insolvent. The bank had undertaken to pledge assets to secure deposits made by the Alien Property Custodian and by the Fleet Corporation. The funds were not property secured by a pledge made to the Secretary of the Treasury under provisions contained in U. S. R. S. 5153 (Title 12, U. S. C. A., Section 90). The Attorney-General succeeded to the powers of Alien Property Custodian. The Comptroller and Receiver recognized the validity of these pledges and paid the claims of the Fleet Corporation and the Alien Property Custodian in full upon the theory that the pledges were legal. The plaintiff general creditor contended that there was

"'. . . The Railway's argument is that the bank could not set up the defense of *ultra vires* since it had the benefit of the transaction; and that the receiver, as its representative, can have no greater right. Neither branch of the argument is well founded. The bank itself could have set aside this transaction. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed; and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. California Bank v. Kennedy, supra; McCormick v. Market Bank (supra); Central Transportation Co. v. Pullman Co. (supra). But even if the bank would have been estopped from asserting lack of power, its receiver would be free to challenge the validity of the pledge. . . .

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no statute which empowered National Banks to pledge their assets to secure the deposits of either the Alien Property Custodian or the Fleet Corporation and the plaintiff filed a bill to require the restoration of the funds claimed to have been preferentially paid by the Receiver of the Bank. The court held the pledges were illegal and decreed a restoration of the funds thus illegally paid out by the Receiver.

Stockholders and Creditors Are Not Bound by Any Act of the Receiver in Apparently Ratifying and Confirming Pledges, as Rights of All Creditors Become Fixed as of Date of Closing. No Act of Receiver Can Transform an Unsecured Claim Into a Secured Claim.

While no point was made in the lower court on the Receiver's apparent recognition of the illegal pledges, it may be proper to discuss that question. It appears that for many years the Comptroller of the Currency permitted National Banks to pledge assets to secure deposits of public funds. Comptrollers knew that this was being done and assumed that it was legal until the decisions of Texas Ry. v. Pottorf, supra, Lewis v. Fidelity & Deposit Co. of Maryland (supra), and Marion v. Sneeden (supra), decided in 1934. These cases were decided several years after the appointment of the Receiver of the Nogales National Bank. In those cases above named it was held that the fact that the Comptroller of the Currency had recognized the valid

ity of illegal pledges made prior to June 25, 1930, did not have the effect of ratifying or validating the same. It would seem therefore that the apparent recognition by the receiver in this case of the pledges involved can not be held to have had the effect of ratifying or confirming them and of transforming the claim from the class of unsecured claims to secured claims. In Texas Ry. v. Pottorf, supra, the Supreme Court of the United States said:

> "The Receiver is not estopped to deny the validity of the pledges. It is the settled doctrine of this court that no rights arise on an *ultra vires* contract, even though the contract has been performed, and that this conclusion cannot be circumvented by erecting an estoppel which would prevent challenging the legality of a power exercised. It is the duty of the Receiver of an insolvent corporation to take steps to set aside transactions which fraudulently or illegally reduce the assets available for distribution for the general creditors, even though the corporation itself was not in a position to do so."

Sections 5236 R. S. U. S.—Title 12 U. S. C. A. 194 and 5242 R. S. U. S.—Title 12 U. S. C. A. 91 very clearly prohibit the preference of one creditor over another and require a ratable distribution for all creditors:

> "DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS.
>
> From time to time, after full provision has been first made for refunding to the United States

any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held." (R. S. 5236, Title 12, U. S. C. A. 194.)

"TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment

in any suit, action or proceeding in any State, county, or municipal court." (R. S. 5242, Title 12, U. S. C. A. 91.)

The Receiver has ample statutory authority to sustain an action to recover excessive payments over and above the amount the depositor is entitled to receive as an unsecured creditor of the bank. The distribution is to be ratable on the claims as proved or adjudicated. That is, according to one rule of proportion applicable to all alike.

National Bank of Selma v. Colby, 21 Wallace 609, 22 U. S. Law Ed. 786;

Scott v. Armstrong, 146 U. S. 499, 36 Law Ed. 1059;

Merrill v. National Bank of Jacksonville, 173 U. S. 131, 43 Law Ed. 640.

In the case of Cook County National Bank v. United States, 107 U. S. 445, 448, the Supreme Court said:

"We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed; the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation; their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the

manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed and other debts paid or their property applied towards such payment. Everything essential to the formation of the banks, the issue, security and redemption of their notes, the winding up of the institutions and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates."

The Case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, 216 Cal. 748, Is a Case in Point as to Principle Which Sustains All Appellant's Contentions.

In the case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, 216 Cal. 748, appears to involve all the principles now before the court, and fully sustains all of appellant's contentions. It will be observed that at the time of making the pledge in the Wood case, the Supreme Court of California found that the Bank was without corporate power to pledge is assets in order to secure deposits of an irrigation district; subsequently to the time of the attempted pledge, but prior to the date of closing the bank, the State Legislature passed an act which would make it lawful for a State Bank to pledge its assets to secure such deposits. The deposits attempted to be secured were deposits made prior to the effective date of the amended

act enlarging the corporate powers of the State Bank. The court held that the deposits made prior to the amendatory legislation were not secured by the pledge, nor was the pledge vitalized by the mere passing of an enabling act without repledging of securities to secure deposits made prior to the passing of the enabling act. The court fully sustained the contentions of the appellant; that an illegal agreement to pledge assets was not validated by the adopted enabling act; that a contract void as stipulating for doing what law prohibits, cannot be ratified; that the recognition of a contract to do an act, prohibited by law when contract was executed, after such act becomes legal, does not constitute ratification of the contract; that a contract doing what the law prohibits does not create an estoppel; that statutes authorizing banks to pledge their assets as security for deposits must be strictly construed and nothing left to implication or doubtful construction; that the general policy of the law will not sanction the pledge of banks' assets as security for deposits in the absence of clear statutory; that innocent depositors' rights must be protected as against an illegal pledge of assets.

The Supreme Court of California in this last-cited case of Wood v. Imperial Irrigation District, 17 Pac. (2d) 132, and following pages, holds:

> "We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of

Section 21 of the Bank Act (as amended by St., 1913, p. 147) which declares that 'the capital and assets of any such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' See, also, Section 27 of the Bank Act (as amended by St., 1913, p. 151). The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said money were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify, or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbured through the commercial department as other depositors' funds had been disbursed. They were not then in the bank.

No deposits were made within the time in which the irrigation district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. *The recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract.* (Italics mine.) Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; Stevens v. Boyes Hot Springs Co., 113 Cal. App. 479, 298 P. 508; Robinson v. Contra Costa, Etc., Ass'n, 112 Cal. App. 252, 296 P. 922; Biggart v. Lewis, 183 Cal. 660, 671, 192 Pac. 437; Colby v. Title Ins. Co., 160 Cal. 632, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. Neither does such a contract create an estoppel. Hedges v. Frink, 174 Cal. 552, 555, 163 P. 884; Colby v. Title Ins. & Tr. Co., supra; Tate v. Commercial Bldg. Ass'n, 97 Va. 74, 33 S. E. 382, 45 L. R. A. 243, 75 Am. St. Rep. 772.

"The act which became effective July 29, 1927, and which specifically authorizes irrigation districts to receive securities for deposit of their funds made with banks, does not purport to be a curative or remedial act, or to operate under any circumstances retroactively. Even where there is no prohibitory statute, it is held that an agreement to give security for county deposits is *ultra vires* and unlawful. Statutes adopted with

a view of authorizing banks to pledge their assets to depositors as security therefor must be strictly construed, and nothing should be left to implication or doubtful construction. In the absence of clear statutory provisions authorizing such pledging of assets, the general policy of the law will not sanction it. The reason of the rule is briefly stated by the Idaho Supreme Court in Porter v. Canyon County, etc., Ins. Co., 45 Idaho 522, 263 P. 632, 634, as follows:

" 'It has been held that, even in the absence of a statute prohibiting it, a bank cannot pledge its assets to secure a depositor; such act being "*ultra vires* and void" (citing Divide County v. Baird, 55 N. D. 45, 212 N. W. 236, 51 A. L. R. 296, and Commercial Bkg. & T. Co. v. Citizens' Trust & G. Co., 153 Ky. 566, 156 S. W. 160, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C. 166). The reason underlying these two strong cases may be reduced to the proposition that a bank organized under a statute permitting it to do business on terms and conditions and subject to liabilities prescribed in the statute has no power to pledge its assets to secure a deposit where such power is not expressly awarded by law. . . .

" 'Under the laws of this state, the commissioner stands as a trustee to protect the rights of all claimants, particularly those of depositors and general creditors. Under the law, the right of the defendant can be only that of a general depositor as such; it can acquire no greater right than that inuring to any other general depositor as such.'

"Discussing the question of public policy of securing depositors where there is no express statutory warrant for doing so, the court in Commercial Bank & Trust Co. v. Citizens' Trust & Guaranty Co., 153 Ky. 566, 156 S. W. 160, 163, 45 L. R. A. (N. S.) 950, Ann. Cas. 1915C 166, said:

" 'Large depositors, if secured, might absorb the greater part of the assets of the bank, and inflict loss upon unsecured depositors and financial ruin upon innocent stockholders under the double liability law. The law contemplates, and was evidently framed to insure fair and uniform dealings by the bank with all of their depositors. A secret pledge to secure one, while others are left without security, although it may be without specific intent to defraud, would nevertheless, in case of loss, justify such an inference.

" 'Public policy will not, therefore, tolerate a practice which might, sooner or later in the event of financial trouble with the bank, enable it to pay and protect the favored few at the expense of the equally deserving many. If the fact was known that a bank had secured some one or more of its depositors and left the others unsecured, no prudent person would deposit with it. No bank would advertise that it engaged in such a practice; because depositors, who were not provided for, would be driven away. The very fact that the transaction is one that will not stand the test of publicity is a strong argument against its legality, as well as its necessity. Banks publish statements of their assets, and individuals deposit on the faith of these published statements. It is well

known that good statements as to assets induce people to deposit their money in banks making such statements. It would be a crowning act of injustice to hold that deposits thus induced are nevertheless cut off from sharing in these assets until some unknown favored few, who have been secretly secured, are satisfied; and it would be a palpable fraud on the part of a bank thus to procure deposits, when its assets were secretly pledged. . . . We are unwilling to hold that a bank, in the absence of some statutory authority, may exercise a right or power which would enable it to perpetrate a fraud upon any of its depositors.'

"Appellant takes the alternative position that the making of the deposits and the giving of the security was either lawful or unlawful. If unlawful, it was unlawful on the part of one party as well as on the part of the other. In other words, if the district could not make the deposit without taking security for such deposit, and the bank was not authorized to give the security, then neither could the deposit be lawfully made nor the security lawfully given; that it was a single transaction, and, if unlawful, both parties are equally at fault, and a trust is immediately created earmarking the particular money which never became the assets of the bank at all, and it must be returned to appellant. We are constrained to hold with the trial court that the deposit was not forbidden by law, but that the giving over of the bonds as security for the deposit was unlawful."

Continuing, the court holds on page 134 of this last cited case as follows:

"Appellant complains somewhat bitterly, and probably not without color of moral justification, and invokes the doctrine of estoppel against said bank based upon the stipulated fact that said bank solicited said deposits, and, had it known that the bank could not have lawfully pledged its bonds, it would not have made the deposits. It is also stipulated that the superintendent of banks was charged with knowledge that the pledged bonds were in possession of the district for more than two years, and he made no complaint as to its possession and claim. The difficulty with this proposition is that the rights of the depositors, innocent third parties, are involved in the transaction, and their protection is one of the first concerns of the law. Their rights are surely equal with those of the district, unless the statute has given a preference to said district, which was an actor in the transaction. If it acted under a mistake of law, its position should not be better than that of other depositors who were ignorant of the bank's approaching insolvency as well as the attempt on the part of the district to secretly secure its deposits.

"From our examination of the various decisions, statutes, and constitutional provisions, we are brought to the conclusion that the deposit of appellant's funds with the bank was not an unlawful or invalid act, but that its right to receive security for its deposit did not find support in law, and, this being so, it must stand upon the same

level with the general depositors; its relation with the bank being that of debtor and creditor."

Assignment of Error II and IV

2. The judgment of the court below is contrary to the agreed statement of facts.

4. The court below erred in finding that said bonds and coupons were pledged by said The Nogales National Bank to plaintiff as security for payment to plaintiff of the public monies and funds of plaintiff on deposit with said The Nogales National Bank, the condition thereof being that said The Nogales National Bank, will promptly pay said public monies to the County Treasurer of said Santa Cruz County upon lawful demand therefor, and will, whenever thereunto required by law, pay to said County Treasurer such monies with interest.

The court below read into the deposit of securities in the National City Bank of New York under a simple escrow receipt containing no specific pledge condition of any kind, the condition of the statutory pledge for Arizona State Banks. (Decree, p. 64 of Record.)

> "That the bonds hereinabove described with the coupons attached thereto were so delivered to said The National City Bank of New York by said The Nogales National Bank as security for payment of the public monies and funds of plaintiff so on deposit with said The Nogales National Bank." (Paragraph VII, p. 74 of Record.)

Assignment of Error No. V

That the court below erred in finding that since the closing and insolvency of said The Nogales National Bank, the sum of Forty-four Thousand One Hundred Ninety-eight and 41/100 ($44,198.41) Dollars has been paid to plaintiff upon said deposit, and that said deposit, secured by said pledge lien upon said bonds, remains unpaid in the sum of Five Thousand Nine Hundred Sixty-eight and 25/100 ($5,968.25) Dollars.

Dividends were the only payments made to the County by the Receiver. The other sums received were from collection of interest coupons and sale of bonds by the County. Paragraph 12, pp. 75-76, of Record.

The right of the County, as a general creditor, to receive dividends on its claim as any other unsecured creditor of the bank is conceded.

A very recent case from the District Court of Idaho, Southern Division, filed on January 11, 1937, passes squarely upon the principal question involved in our case. This case came to my attention on the day of reading proofs of the brief and too late to be printed in its proper place in the brief. I am accordingly adding it to the printed brief just before the conclusion, the only place where it could be inserted without causing a fatal delay in the printing of the brief and beg the court's indulgence for this violation of the rule.

In the Idaho case the funds involved were deposited prior to the passage of the Act of June 25, 1930, and the pledge of assets also was prior to the Act. In a finding for the Receiver Judge Cavanah quoted the case of Wood v. Imperial Irrigation . . . "deposits made prior to the Amendatory legislation were not secured by the pledge given when the law did not authorize the giving of the pledge, *nor was the pledge vitalized by the mere passing of the new law without repledging the security to secure the deposits made prior to the adoption of the law*" . . . (Italics mine.)

This Idaho case being so squarely in point with our own case the whole opinion is printed in the appendix.

CONCLUSION

It is respectfully submitted that to allow the attempted pledge would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of insolvency uniform treatment of depositors and ratable distribution of assets.

STEPHEN D. MONAHAN,
Attorney for Appellant.

APPENDIX

APPENDIX

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

G. D. THOMPSON, Receiver of the Twin Falls National Bank of Twin Falls, Idaho, a defunct National Banking association,	Plaintiff,	No. 1930
vs.		
TWIN FALLS HIGHWAY DISTRICT OF TWIN FALLS, COUNTY, STATE OF IDAHO,	Defendant.	

OPINION

Chapman & Chapman, Twin Falls, Idaho
Attorneys for the Plaintiff.
M. J. Sweeley, Twin Falls, Idaho
Everett M. Sweeley, Twin Falls, Idaho
Attorneys for the defendant.

January 11, 1937

CAVANAH, District Judge.

This action is brought by the Receiver of the Twin Falls National Bank against the Twin Falls Highway District to recover the sum of $3,279.09 claimed to have

been illegally paid by R. H. Haas the former Receiver of the bank from the proceeds of the sale of pledged bonds of the bank which had been deposited with the County Auditor on January 19, 1929, to secure the deposits of the District in the bank, made prior to June 25, 1930. The bank was closed and taken charge of by the Comptroller of currency on November 22, 1931. For many years prior to January 19, 1929, it had been a National Banking Association, under the laws of the United States and authorized to do business at Twin Falls, Idaho. The bonds, during the period from the time they were deposited by the County Auditor until the sale on April 27, 1932, remained undisturbed. The Bank did not repledge the bonds as security for any deposits of the district made between January 19, 1929, and June 25, 1930. Subsequently to the making of the pledge various sums of money had been deposited by the District in the bank and of which $4,192.42 had not been withdrawn prior to the closing of it. After June 25, 1930 the District made deposits of its funds in the Bank and when it closed there was the sum of $10,-052.89 of the District's on deposit which included the $4,192.42 deposited prior to June 25, 1930. The District then made a demand on the Receiver for payment of the $10,052.89 and after March 19, 1932, filed a proof of claim with the Receiver which was allowed by him as a secured one, and after that was done the Receiver and the County Auditor, for the purpose of paying the secured claim, caused the pledged assets of the bank to be sold for $12,525.04 and paid from the proceeds of

the sale of the bonds, to the District in payment of its demand and proof of secured claim, the sum of $10,-052.89, and interest of $116.67, under an order of the State District Court, after the filing of a petition by the Receiver for authority.

The facts have been stipulated and they substantially show the above and the account of the District in the bank from January 19, 1929 to November 22, 1931. It shows that the $4,192.42 of the sums deposited prior to June 25, 1930 remained in the account after the closing of the bank. The total amount on deposit in the account of June 25, 1930 was $13,456.86, and after deducting from it the total of all sums withdrawn from the account from that date until the date the bank closed, which was $9,264.44, there remained in the bank the amount of $4,194.42 of the amount deposited prior to June 25, 1930. The officers and directors of the bank knew that the moneys deposited were public moneys and at the time of the closing of it there was sufficient unpledged assets from which to pay in full the account of the District. The Receiver has paid to date, a dividend of twenty-two per cent.

Under the facts thus presented the propositions of law to be considered are:

First; Was the act of the Bank, a National Banking Association, in pledging its assets to secure deposits of public moneys made by the District, in the bank, prior to June 25, 1930, illegal, and if so, were the subsequent acts of the Receiver and the County Auditor taken for the purpose of carrying out the original

pledge in approving and paying the proof of the secured claim of the District, invalid and unlawful?

Second; If the original pledge of the Bank's bonds be illegal could any act of the Bank, after June 25, 1930, constitute a legal ratification of an illegal pledge of the assets of the bank to secure the deposits made prior to that time?

Third; If the original pledge is illegal and the acts taken pursuant thereto could not be legally ratified, were the deposits of the District made in the bank prior to June 25, 1930, trust property held by the Bank for the District, and do the facts give rise to such a trust as will justify or sanction the payments made by the Receiver of the District out of its assets? and,

Fourth, Is the Receiver now barred the relief sought by the reason of the adjudication made by the State District Court of the pledge, sale and disposal of the assets of the Bank?

A national bank prior to June 25, 1930 was not granted authority to legally pledge its assets to secure deposits whether public or private. Act of June 3, 1864, 13 Stat. Section 45, Congress realizing that the original Act of 1864 did not grant such powers, adopted the Act of June 25, 1930 amending the original Act, providing that a National Bank can only do so legally, if it is located in a state in which other banks are so authorized by the State law. The amended Act conferring the additional powers reads: "Any association may, upon the deposit with it of public money of a state or any political subdivision thereof, give secur-

ity for the safe-keeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the state." 46 St. 908, Title 12 U. S. C. A. Section 90. This construction of the National banking laws has been settled by the Supreme Court and the Ninth Circuit Court of Appeals in Texas & Pacific Railway Co., v. Pottorff Receiver, 291 U. S. 245, 54 S. Ct. 416; City of Marion v. Sneeden Receiver, 291 U. S. 262, 54 S. Ct. 421; Lewis v. Fidelity & Deposit Co., of Maryland, 292 U. S. 559, 54 S. Ct. 848; Utter, District Court Clerk et al. v. Eckerson, 78 Fed. (2) 307.

In the case of City of Marion v. Sneeden, supra, where the question was before the Court is is said: "For the reasons stated in Texas & Pacific Ry. Co., v. Pottorff, decided this day,—we are of the opinion that the Act of 1864 did not confer the power to pledge assets to secure any public deposits. . . . A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized."

It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here and as the bank could not then pledge its assets to secure them, the money when then deposited became a part of the common fund of the commercial department of the bank and was subject to the same risk as moneys of all other

persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified.

The very interesting and sound reasoning in sustaining this thought will be found in the decision of the Supreme Court of California in the case of Wood v. Imperial Irrigation District, 216 Cal. 748, 17 Pac. (2) 128, where the facts and the amendatory act of the State are similar to those involved in the present case, and it was there held that the deposits made prior to the amendatory legislation were not secured by the pledge given when the law did not authorize the giving of the pledge, nor was the pledge vitalized by the mere passing of a new law without repledging the security to secure the deposits made prior to the adoption of the law, and that the "Statute adopted with the view of authorizing banks to pledge their assets to depositors as security therefor must be strictly construed, and nothing should be left to implication or doubtful construction. In the absence of clear statutory provisions authorizing such pledging of assets, the general policy of the law will not sanction it."

Of course, it has long been settled by the Courts of the United States when in construing the national banking laws that the public policy of the United States in relation to National Banks appears in the Acts of Congress, which have for their primary purpose the

protection of all of the depositors of the bank alike, and no implied power exists to pledge the assets of a National bank as security for some of the depositors.

The further thought is urged by the District that even if it be held that the pledging of the bonds of the bank were illegal, yet the deposits by the Districts were public moneys and are special deposits giving rise to trust funds which have a preference over other deposits in the bank, is untenable when we are forced to the conclusion that the pledging of the assets of the bank as security in the first instance were unauthorized by the law, and the District could not make the deposit without taking security for them. No trust arises, nor any preference would be be justified merely upon the ground that the deposits were of public moneys. Nothing under such circumstances, and the laws of the United States exists but a simple debtor-creditor relationship between the public agency depositing the money and a depository bank. Texas & Pacific Ry. Co., v. Pottorff supra; O'Connor et al v. Rhodes, 79 Fed (2) 146; Ross v. Knott et al. (DC Fla) 13 Fed Supp 963; Illinois Central R. Co. v. Rawlings 66 Fed (2) 146.

Lastly; Has there been an adjudication in the State District Court which concludes the Receiver from the relief sought in the present action? The principle of law by which this question must be determined is well settled. The question relates to not one of authority but one of adjudication. The petition filed in the State District Court was entitled "In the matter of the Re-

ceivership of the Twin Falls National Bank." By the petition the Receiver prayed for an order of the Court authorizing and permitting him to sell the bonds at a private sale which was the limit of the power of the Court under Section 192, title 12 U. S. C. A. as it is there provided that the Receiver under the direction of the Comptroller takes possession of the assets of the bank and upon order of a Court of competent jurisdiction may sell all of the real and personal property of the bank on such terms as the Court shall direct. The procedure there does not contemplate a trial in Court nor place the affairs and assets of the bank under the jurisdiction and control of the Court, for the statute seems clear that in the allowance and payment of claims against the bank that matter is exclusively vested in the Receiver under the direction of the Comptroller. This is the interpretation given to the statute by the Supreme Court in the case of In re Chetwood, 165 U. S. 443, 458 where the Court said; "The Receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank. Under Section 5234 of the Revised Statutes, when the Receiver deems it desirable to sell or compound bad or doubtful debts, or to sell the real and personal property of the bank, it devolves upon him to procure "the order of a Court of record of competent jurisdiction," but the funds arising therefrom are disbursed by the Comptroller, as in the instance of other collections." This Statute was also before the Ninth

Circuit of appeals in the case of Fifer et al. v. Williams 5 Fed (2) 286, 288 where it is said: "In the present matter, as in the Chetwood case, supra, the application was entitled 'In The Matter' of the receivership of the insolvent bank. By the application the receiver did not submit himself and the affairs of the bank to the jurisdiction of the Court; nor did the presentation of the application operate to make the receiver an officer of the court, or place the assets of the bank under the control of the court 'in the sense in which control is acquired where a receiver is appointed by the court.' In re Chetwood, supra. He belongs to the executive branch of the government, and his custody of assets is not that of the court. Farrell v. Stoddard (D. C.) 1 F. (2d) 802. The procedure outlined by the statutes did not contemplate a trial in court. And no case is cited which lends support to the view that the statute intended that an objecting creditor could litigate with the receiver—who represents creditors and the insolvent bank—the question determined by him as to the advisability of disposing of the assets of the insolvent institution. There is no suit; no parties in the legal understanding of the term; no process must issue; no one is authorized to appear on behalf of the receiver or any one else, or to subpoena witnesses. It is an ex parte proceeding, and, though by the will of Congress put under judicial cognizance, is not by its own nature a judicial controversy. The fact that, when the receiver filed his application, the judge sought information and directed that notice be published that the court would hear persons inter-

ested in the insolvent bank upon the question of the proposed sale, does not change the administrative character of the proceeding. The Course followed was evidently, out of a cautious wish to gain advice that would be helpful in finally determining whether or not the order applied for by the receiver should be granted. Ex parte Cockroft, 104 U. S. 579, 26 L. Ed. 856. No statute gave to the objectors any legal right to demand to be heard or to be made parties to the proceeding; nor is there any statutory provision for an appeal from an order for the sale of the assets of an insolvent national bank."

The State District Court under the Federal Statute not having power to decide the question as to the legality of the deposit or to disburse it, or whether the pledge of the assets of the bank was legal may not assume jurisdiction to adjudicate these questions, and therefore its Order was limited to authorizing the sale of the bonds and the terms thereof and nothing more. To constitute an adjudication and bar to further consideration of a litigated question there must have been at some prior time, a judicial determination of the controversy. That has not been done under the record and the doctrine of res adjudicata could not be invoked in the present case.

In view of the conclusion reached that the pledge failed because of being illegal, the District is entitled only to a dividend as a general creditor and the relief prayed for by the plaintiff in his complaint, for the

recovery of $3,279.09 due and interest, being the balance of the $4,192.42 is granted with costs.

Findings and decree to be prepared by counsel for the plaintiff and submitted to counsel for the defendant and the Court within ten days.